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Supreme Court of the United States

OCTOBER TERM, 1939

No. 297

T. L. MORRIS, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF

FRANK J. LOONEY,
Attorney for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF

To the Honorable, the Justices of the Supreme Court of the United Statess

The petition of T. L. Morris, L. Hugh Morris, M. N. Morris, Z. B. Freeman and J. L. F. Beasley, with respect, shows:

I.

That petitioners together with several corporate defendants and two other individ-

uals were indicted in the Western District of Louisiana on June 21, 1937, the indictment being endorsed "A true bill:—Vio: Section 215, Penal Code—using the mails to defraud." (R-2-28).

That a jury trial was had and on July 11, 1938 a mistrial was entered because the jury could not agree on a verdict. (R78-79)

On March 13, 1939 a new trial was begun resulting in a verdict of guilty against petitioners and other defendents except the two individuals, R. C. McCoy, Jr. and H. R. O'Gwin; the verdict being returned April 1, 1939. (R104 and R44).

Demurrer and motions to quash were filed covering the issues herein raised as to the indictment, on behalf of all defendants, before the first trial, and were overruled (R28-43).

As also motion in arrest of judgment after the last trial on behalf of all defendants convicted (R44-45), and motion for new trial (R45-50).

These were overruled, whereupon defendants, after sentence, appealed (R33-67) and after legal extensions of time lodged their perfected appeals in the United States Circuit Court of Appeals, 5th Circuit on Dec. 13, 1939 (Title page) said appeal being accompanied by assignment of error and bills of exception (R109-205).

The United States Court of Appeals, 5th Circuit affirmed the judgment on June 11, 1940 (R217-233), on July 8, 1940 denied motion for rehearing (R239).

STATEMENT

1. The first count in the indictment read:

> "That before the committing of the several offenses in this indictment herein mentioned, (then follows names of defendants) * * did devise and intend to devise a scheme and artifice to defraud and to obtain money and other property by means of false and fraudulent representations, pretenses and promises from Effie M. Dyer" and others named) "and divers and sundry other persons to your grand jurors unknown, etc." (R2-3).

The 3rd paragraph in this first count read:

> "It was further a part of the said scheme and artifice to defraud that the said defendants would, on or about April 19, 1934 transfer to the said American Benefit Association x x the business of the Southern Protective Union x x and that the said defendants, as the American Benefit Association would receive all funds due the expense fund of the Southern Protective Union." (R5).

Both the American Benefit Association and the Southern Protective Union are named as defendants in the indictment and were convicted. (R44)

The 4th paragraph of the first count reads:

> It was further a part of the scheme and artifice to defraud that the said defendents would transfer to the said American Benefit Association the Louisiana Division of the National Protective Union x x x and that the said defendants as the American Protective Association, would receive the premiums due on the policies in the Louisiana Division of the National Protective Union (R5).

These allegations it was contended made the indictment duplicitous.

2. On the trial of the case a number of exceptions were taken, and errors were assigned in the Court of Appeals thereon, to evidence of transactions, not in themselves criminal, in which 3rd parties or some of the defendants and third parties were concerned, which transactions occurred after the indictment was found and in some instances after the first trial of accused.

Illustrative of this is Bill of Exception No. 18, taken when a government witness was asked whether or not on June 30, 1937,

the Gibraltar Life Insurance Company (not named in the indictment) which had issued a check to the Imperial Life Insurance Company, was not as badly impaired as it, the Gibraltar Life Insurance Company, was before the money previously borrowed from the Imperial Life Insurance Company was deposited in the bank (R145).

Another illustration is found in Bill of Exceptions No. 6, taken to a ruling of the trial court admitting in evidence a decision of the Supreme Court of Colorado rendered and made final July 12, 1937. (R-127). This case entitled International Service Union vs. People is reported 101 Colo. 1, 70 Pac. 2nd 451.

The indictment in the case on trial was found June 21, 1937, filed June 25, 1937 (R2 and 28).

3. On the trial of the case, a government witness, L. O. Taylor, Postoffice Inspector, having testified that defendant refused permission to audit the books of the American Benefit Association was asked on cross examination about making application to the District Judge for an order for audit whereupon the trial judge said:

> "That is not true in a criminal case—there was no matter pending before the court as to which the court could have ordered an audit made. Furthermore, a

defendant in a criminal case is not required to furnish evidence against himself and if he refused to let the government see his books, the government has no legal means of getting at them (R148).

JURISDICTION

The case involves questions of criminal law in which the jurisdiction of the Court of Appeals is final unless the Court subject such decision to review.

It is contended that this Court has jurisdiction to review the judgment under section 347 of Title 28 of the United States Code. See United States vs. Gulf Refining Co. 268 U. S. 542.

QUESTIONS PRESENTED

1. Can an indictment in one count charge both a scheme to defraud persons of their money and property by means of false and fraudulent representations pretenses and promises and schemes to defraud corporate entities by securing control of their funds by means other than representations pretenses and promises, without being void for duplicity?

2. Can evidence of transactions not shown to be criminal, but highly prejudical be admitted when third persons were involved in transactions or when only one or more

of defendants were participants, and when such transactions took place after the date of filing of the indictment?

3. Can a trial judge, in the presence of the jury, make a statement that the law does not permit an audit to be made of corporation books in a criminal case on order of a judge, because no accused can be made to incriminate himself, when it is material to the issue to prove that there was an act of concealment on the part of a defendant or defendants which might influence the jury in determining guilt or innocence?

I.

REASONS RELIED ON FOR GRANTING WRIT

In deciding that an indictment is not duplicitous when it charges both a scheme to defraud persons by means of false and fraudulent representations, pretenses and promises and schemes to defraud corporations by other means without resorting to such representations, pretenses and promises, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court.

In United States vs. Young 232 U. S. 155, 161-2, the court indicated the schemes were distinct.

II.

In admitting evidence of transactions which were not in themselves shown to be criminal and which took place after the indictment was filed the Court of Appeals rendered a decision in conflict with other circuit courts of appeal and especially in conflict with the decision of the Court of Appeals, 9th Circuit, McLafferty vs. United States 77 Fed. 2nd, 715 and of the 10th Circuit Coulston vs. U. S. 51 Fed. 2nd, 178 and of the 6th Circuit Court, Wilson vs. U. S. 109 Fed. 2nd 895. See also Williams vs. Great Southern Lumber Co. 277 U. S. 19, 26.

III.

In making an erroneous and prejudicial statement of the law that tended to prejudice the jury against defendant on the theory that they were concealing material evidence, which without their permission, the government could not secure and in stating, without any ground, that a corporate defendant could not be compelled to submit its books to audit in a criminal case because of the prohibition against self-incrimination, in direct conflict with an applicable decision of the Supreme Court of the United States, to-wit: Wilson vs. U. S. — 221 U. S. 361.

Petitioners, herewith present, as part of this petition, transcript of record in the Circuit Court of Appeals, 5th Circuit.

Wherefore, your petitioners respectfully pray that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 9092, T. L. Morris et al; appellants vs. United States of America, appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Court and that your petitioners be discharged without day and have such other and further relief in the premises as this Honorable Court may deem just and proper—

FRANK J. LOONEY,
Attorney for Petitioners.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petition should be granted by this Court.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The judgment of the Court of Appeals was entered June 11, 1940. (R233), petition, for rehearing was denied July 8, 1940 (R239) Reported in 112 Fed., 2nd, 522.

The jurisdiction of this Court is invoked under Title 28, Section 347 of the United States code. The facts have been fully set forth in the petition for Certiorari, page 1 to 9 supra.

SPECIFICATION OF ERRORS ASSIGNED—

The Court of Appeals 5th Circuit erred in holding that the indictment on which they were convicted did not contain duplicitous averments inasmuch as that indictment specifically alleges two schemes to defraud and a scheme to obtain money by false pretenses, since the first count, which is included in subsequent counts, setforth a scheme to obtain money from individuals by means of false pretenses, representations and promises and also two separate schemes to obtain the funds of two insurance organizations by obtaining control over such organizations and then by fraud depriving these organiz-

ations of their funds—and no false promises, representations or pretenses have any connection with these schemes, thus directly pointing out in the indictment itself that differentiation between the two schemes, which the court in the Livezey Case 279 Fed. 496, quoted in the opinion of the Circuit Court of Appeals herein, said was not indicated.

II.

The Court erred in holding that evidence of acts not even shown to be criminal, but which the Court below said tended to show fradulent intention, was admissible, although these so-called acts showing intention were committed after the date of the indictment herein and in some instances after the date of the first trial of these defendents and in no case was any connection of all defendants shown in connection with such acts.

III.

The Court erred in holding that no error was committed by the lower Court in stating, while overruling an objection of defendants' counsel, in the presence of the jury:

> "Mr. Hughes that is not true in a criminal case — there was no matter pending before the Court as to which the Court could have ordered an audit made.

"Further, a defendant in a criminal case is not required to furnish evidence against himself, and if he refused to let the Government see his books, the Government has no legal means of getting at them."

ARGUMENT

The indictment charged three separate and distinct schemes condemned by Penal Code section 215, U. S. Code T. 18, Sec. 338, two of these schemes being simple schemes to defraud by obtaining control of funds belonging to two separate corporate entities and the third to obtain money and property by false and fraudulent representations and promises from various individuals.

This indictment was attacked in the lower court as duplicitous, and error assigned to the adverse ruling on the demurrer, which error was again made by the Court of Appeals and is specified here.

With the Courts permission we will trace the history of the statute now section 215, Penal Code, formerly United States Revised Statute 5480.

Originally U. S. R. S. 5480 required that the scheme include intent to use the mails, but in 1889, the section was changed to read:

"If any person, having devised, or intending to devise, any scheme or artifice

> to defraud or to sell, etc. ** any counterfeit or spurious coin ** or anything ** held out to be counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called 'The Saw Dust Swindle', etc."

The Court can see that as the Statue then read there was a clear distinction between a "scheme to defraud" and a scheme to obtain money in distinctive ways.

When the Criminal Code was adopted, in 1909, Congress, calling this Section 215, enacted.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud [or for obtaining money or property by means of false or fraudulent pretenses, representations or promises"].

It is clear that in 1909 Congress deemed it necessary to enlarge the scope of the section dealing with "using mails to promote frauds," and to declare that in addition to devising a scheme "to defraud," it was a crime to devise a scheme "to obtain money by false and fraudluent representations, pretenses or promises."

In Moore vs. U. S. 2 Federal (2) 839, 841, the court distinguishing between the

language of the original act and the new words "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises," said,

> "The added words were evidently intended to enlarge the scope of the act, and to denounce and punish the use of the mails in execution not only of a scheme to defraud, but also of a scheme to obtain money by false pretenses or promises under circumstances where but for the false pretenses and promises the money or property would not be parted with."

The Supreme Court of the United States in United States vs. Young, 232 U. S. 155, reversed the decision of the lower court holding bad the first count in an indictment which charged "a scheme and artifice to defraud."

The Supreme Court said:

> "The District Court ** was of opinion that something more was necessary to an offense under Sec. 215 than the averment of the scheme and its execution in the manner stated. The Court expressed the view, we have seen, that the indictment did not clearly set out the scheme to defraud; that it did not allege the scheme devised or intended was by

means of false or fraudulent pretenses, representation or promise. *** It is manifest that the Court consider these facts were necessary to be averred in order to constitute an offense under S. 215. In this the Court was in error." pp. 161, 162.

There is another feature in the cited case, Young vs. United States, which is pertinent.

After the first count, there was a second, which charged defendant,

> "With having devised a scheme and artifice for obtaining moneys, goods, and chattels by means of false and fraudulent representations and promises etc.'

This is taken from the opinion of the Supreme Court which added "The manner and means are charged as in the first count.

It is obvious that the Supreme Court gave its approval to an indictment which did not confuse "a scheme to defraud" with a "scheme to obtain money or property by means of false and fraudulent pretenses, representations or promises," and by so approving showed that "a scheme to defraud" which did not need allegations about "false or fraudulent pretenses, etc." was a distinct and separate offense from a "scheme to obtain money etc." which did require such an allegation.

This decision shows clearly that Congress added new words deemed necessary to meet its purposes.

In the indictment herein considered there is a complete answer to the statement of the 5th Circuit Court of Appeals in Livezey vs. United States 279 Fed. 496, where that court said:

> "It is not pointed out in argument that there is a difference between a scheme to defraud and one to obtain money by false and fraudulent representations, and we are unable to see any."

That difference is clearly pointed out in this indictment where one fraud was to be committed by securing control of corporate funds to misappropriate and the other by representation to persons which would deceive and having secured their money or property defraud them of it.

2. The second specified error was in permitting evidence of transactions which were not criminal in themselves and which according to the per curiam of the court found under Bill of Exemptions 2 (R120).

> "Were admissible as corroborative of the main charge, and for the purpose of showing intent and to illustrate the full extent of the scheme."

The law on the subject of admission of evidence of this nature is: 1st, it is necessary to show that such transactions were connected with actual violations of the law, and 2nd, that they could only affect the parties shown to participate in them. See Coulston vs. United States 51 Fed., 2nd, 178, 180; McLafferty vs. United States 77 Fed., 2nd, 715, 719-20: Parish vs. United States 260 Fed. 529, 531 in which Judge Sanborn says:

> "It is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive."

None of these features were present in Fish vs. United States 215 Fed 545. Judge Bingham of the First Circuit said, p549,

> "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all only in plain case."

Had there been but one instance of the admission of this character of evidence, counsel might not insist on this as a reason for reversal, but in numbers of instances this sort of evidence was introduced. For example see R 117, 127, 133, 135, 141, 145.

The trial judge himself furnishes proof

of the dragging in of such things as the "Resume" inserted by him in connection with his per curiam and shown in (Record) 137, 138.

3. Bill of Exception No. 20 (R 147, 148) was based on the sustaining by the Court of an objection to a cross examining question asked of a government witness, L. O. Taylor, Post-office Inspector, who was the same person that read the "Resume" previously noted. In the course of this cross examination Taylor had stated that he had asked of the American Benefit Association permission to audit its books and was refused. Some of the defendants were its officers.

Taylor was then asked by defendants' counsel if he did not know he could have made application to the District Judge for the appointment of an auditor and the judge would have ordered one.

On Government counsel's objection, the Court said:

> "Mr Hughes, that is not true in a criminal case — there was no matter pending before the court as to which the court could have ordered an audit made.
>
> "Furthermore a defendant in a criminal case is not required to furnish evidence against himself, and if he refused to let the Government see his books, the Government has no legal means of getting at them."

This error of the Court gave the picture to the jury—a very prejudiced one—of an act of concealment on the part of one of the defendant companies, which should have been referred to as "it" and not "he".

The law is not as the Court stated it.

> In Wilson vs. United States 221 U. S. 361, the Supreme Court of the United States said, and has repeatedly reaffirmed, "The corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production on the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books to duly constituted authority when demand is suitably made."

Hence it follows that an audit can be made by the government of books by legal process even though the object be "to discover its violations of the law."

The same rule applies to an officer of the corporation with reference to the corporation books. 1d.

It is respectfully submitted that the petition for certiorari should be allowed and the Honorable Supreme Court of the United States, after hearing should reverse the judgment of the Court of Appeals, 5th Circuit and order defendants discharged.

FRANK J. LOONEY,

Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 297

T. L. MORRIS, L. HUGH MORRIS, M. N. MORRIS, Z. B. FREEMAN, AND J. L. F. BEASLEY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 216–228) is reported in 112 F. (2d) 522.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 11, 1940 (R. 228). A petition for rehearing (R. 229–233) was denied July 8, 1940 (R. 234). The petition for writ of certiorari was filed August 1, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated March 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment was duplicitous.

2. Whether evidence of transactions similar to those charged in the indictment was improperly received.

3. Whether the petitioners were prejudiced by the remarks of the trial court in sustaining an objection to a question asked on cross-examination by defense counsel.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice * * *, place, or cause to be placed, any letter, postal card, * * *, in any post office, * * *, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * *, shall be fined not more than $1,000, or imprisoned not more than five years, or both (R. S. § 5480; Mar. 2, 1889, c. 393, § 1, 25 Stat. 873; Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130).

STATEMENT

An indictment in eleven counts was returned against the petitioners and others in the District Court of the United States for the Western District of Louisiana (R. 2–28). Each count charged the defendants with a use of the mails in furtherance of a scheme to defraud and to obtain money and property by means of false and fraudulent representations, pretenses, and promises, in violation of Section 215 of the Criminal Code.

On the first trial the jurors were unable to agree upon a verdict (R. 78–79). At the second trial, the one here involved, the petitioners were found guilty on all counts of the indictment (R. 44, 202). On the first count petitioners L. Hugh Morris and J. L. F. Beasley were each sentenced to imprisonment for three years and the petitioners T. L. Morris and Z. B. Freeman to imprisonment for five years and to pay a fine of $1,000. On the remaining counts imposition of sentence on these petitioners was suspended for a period of five years after the expiration of the sentence on count one, and they were placed on probation (R. 50–53).[1] Imposition of sentence on petitioner M. N. Morris was as to all counts apparently suspended and he was placed on probation for a period of

[1] Since the imposition of sentence upon these petitioners was suspended as to all counts except the first, it follows that they can only appeal from the judgment as to that count. See *Berman* v. *United States*, 302 U. S. 211, 212–213.

three years (R. 66, 68).[2] On appeal the Circuit Court of Appeals unanimously affirmed the judgments of conviction (R. 216–228).

Petitioners do not question the sufficiency of the evidence to sustain their convictions. A comprehensive analysis of the indictment is contained in the opinion of the Circuit Court of Appeals (R. 217–220). Briefly summarized, the indictment alleged that the defendants devised a scheme to defraud and to obtain money and property from certain named individuals and others by means of false and fraudulent representations, pretenses and promises. The scheme was to be carried out by the defendants through their organization and operation of various insurance corporations and the sale of life insurance, under false and fraudulent representations, not only to the individuals named, but to approximately 55,000 other persons, consisting principally of that class of the aged who were unable to obtain life insurance from legitimate companies and of those persons who, by reason of purported low premium rates and the lack of the requirement of medical examination,

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[2] This petitioner's notice of appeal and the docket entries of the District Court (R. 66, 68) indicate the suspension of imposition of sentence as to all counts. This view is fortified by the fact that the record does not contain any judgment with reference to this petitioner. If imposition of sentence was suspended upon all counts, this petitioner was not entitled to appeal and is therefore not properly in this Court. See *Berman* v. *United States*, *supra*.

could be persuaded to purchase the policies and certificates of defendants' companies.

ARGUMENT

I

Petitioners contend that the indictment is duplicitous because it charged the defendants with devising not one but several schemes, i. e., two schemes to defraud separate corporate entities and a third scheme to obtain money and property by false and fraudulent representations and promises from individuals. It is apparent from the analysis of the indictment contained in the opinion of the Circuit Court of Appeals (R. 217–220) that the indictment charged but one general scheme—a scheme to defraud and to obtain money and property by false and fraudulent representations from those persons whom the defendants could induce to purchase life insurance from the companies organized and operated by them. The allegations with reference to the transfer to the defendants' American Benefit Association of the business and funds of other insurance companies (R. 5) were obviously merely the detailing of steps which the defendants employed in carrying out their scheme to defraud policy holders. As the Circuit Court of Appeals said (R. 220):

> The alleged scheme to defraud was large and necessarily had many angles to it. It is natural that a scheme of this magnitude

> would have many parts and in order to set it out properly, extensive averments were required. The indictment, however, embraces only one scheme.

It has been often held that the setting out in a mail-fraud indictment of the various means and devices by which the fraudulent scheme is to be effectuated does not render the indictment duplicitous. *Silkworth* v. *United States,* 10 F. (2d) 711, 714 (C. C. A. 2d), certiorari denied, 271 U. S. 664; *Sunderland* v. *United States,* 19 F. (2d) 202, 207 (C. C. A. 8th); *Worthington* v. *United States,* 64 F. (2d) 936, 938 (C. C. A. 7th); *Greenbaum* v. *United States,* 80 F. (2d) 113 (C. C. A. 9th).

Petitioners also contend that the mail fraud statute differentiates between a scheme to defraud and a scheme to obtain money by false and fraudulent representations, pretenses and promises and that the statute makes each a separate offense. They therefore assert that an indictment which, as here, charges that the scheme had as its objects both a defrauding and the obtaining of money by false representations, pretenses and promises, is duplicitous. This contention, however, overlooks the fact that the gist of the offense is the use of the mails.[3] This being so, it follows that but one

[3] *Durland* v. *United States,* 161 U. S. 306, 315; *Van Riper* v. *United States,* 13 F. (2d) 961, 967 (C. C. A. 2d); *Havener* v. *United States,* 49 F. (2d) 196, 198 (C. C. A. 10th), certiorari denied, 284 U. S. 644; *Rude* v. *United States,* 74 F. (2d) 673, 675 (C. C. A. 10th).

offense is committed by each use of the mails even though such use is in pursuance of a scheme having both of the objects recited in the statute. An indictment charging the use of the mails in furtherance of such a scheme is, therefore, not duplicitous. *Hass* v. *United States,* 93 F. (2d) 427, 432 (C. C. A. 8th); *Norcott* v. *United States,* 65 F. (2d) 913, 916 (C. C. A. 7th), certiorari denied, 290 U. S. 694; *Livezey* v. *United States,* 279 Fed. 496, 498–499 (C. C. A. 5th), certiorari denied, 260 U. S. 721. Cf. *United States* v. *Stever,* 222 U. S. 167.

Petitioners cite no cases to the contrary. *United States* v. *Young,* 232 U. S. 155, and *Moore* v. *United States,* 2 F. (2d) 839 (C. C. A. 7th), upon which they rely, do not involve the question of duplicity.

II

Petitioners also contend that the trial court erred in admitting evidence of various transactions which, they assert, were not in themselves criminal, were participated in by third parties or by only some of the defendants and third parties, and occurred after the returning of the indictment and in some instances subsequent to the first trial of the accused. This contention was so adequately and comprehensively answered in the opinion of the Circuit Court of Appeals (R. 223–225, 226–227) that further discussion would be repetitious.

The cases cited by the petitioners are not in conflict with the decision of the Circuit Court of Ap-

peals. They involved prosecutions in which a specific intent was not required to be proved. They recognize, however, that in a case where such an intent is an element of the offense the intent may, as was held by the court below, be established by evidence of transactions similar or kindred to that charged. Of course, as is indicated in the opinion of the Circuit Court of Appeals (R. 224), it is not necessary that such similar transactions be criminal in nature.

III

A Post Office inspector testified for the Government on rebuttal that he had asked permission of the American Benefit Association, one of the defendants, to audit its books and that permission had been refused. On cross examination by defendants' counsel, the witness was asked if he did not know that he could have made application to the District Judge for the appointment of an auditor and the judge would have ordered one. This question was objected to by Government counsel on the ground that the court had no such authority in criminal cases (R. 147–148). In sustaining the objection the Court stated (R. 148):

> Mr. Hughes, that is not true in a criminal case—there was no matter pending before the Court as to which the Court could have ordered an audit made. Furthermore, a defendant in a criminal case is not required to furnish evidence against himself, and if he

> refused to let the Government see his books, the Government has no legal means of getting at them.

Petitioners contend that the trial court misstated the law and thereby gave the jury the prejudicial picture of an act of concealment on the part of one of the defendant companies.

It would seem that if any such picture was presented to the jury it received this impression not from the statement of the court upon which petitioners' contention is based but from the testimony of the Post Office inspector, to which no objection was apparently made, that the corporation had refused him permission to audit its books. At most the court's statement was only partially wrong. It obviously could not have ordered the production of the corporation's books for an audit unless some proceeding were pending before it. Also, if any prejudice resulted from the court's statement the prejudice was one which normally would have resulted to the corporation and not to the petitioners. In any event, since a full transcript of the evidence is not contained in the Record (see R. 207–212), the petitioners clearly are not in a position to urge that reversible error resulted, a conclusion which could only be reached after an appraisal of the evidence against them.

CONCLUSION

Petitioners' contentions were carefully reviewed and properly rejected by the Circuit Court of Ap-

peals. There exists no conflict of decisions and there is involved no important question of federal law. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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